

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 February 2004

Case No. 1999 BLA 00550

In the Matter of

MARGUERITE CHILDERS,
Widow of
GOLAN CHILDERS,
Claimant

v.

TENNESSEE CONSOLIDATED COAL CO.,
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances:

Graham Swafford, Esq.
For the Claimant

Ronald E. Gilbertson, Esq.
For the Employer

BEFORE: MOLLIE W. NEAL
Administrative Law Judge

DECISION AND ORDER ON REMAND -- DENYING BENEFITS

This case arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (hereinafter referred to as "the Act"), 30 U.S.C. § 901 *et seq.*, and the regulations promulgated pursuant thereto and found at Title 20, Code of Federal Regulations (CFR). Regulation sections cited in this Decision and Order refer to sections of that Title. Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a chronic dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

This claim is before the undersigned upon remand from the Benefits Review Board (the "Board"). Initially, Golan Childers (the "miner") filed an application for benefits on November 3, 1997. (DX 1). After the miner's death on December 24, 1997, his widow, Marguerite Childers (the "Claimant"), filed an application for survivor benefits on March 20, 1998. (DX 2) The Office of Workers' Compensation Programs issued an initial determination of entitlement on both claims, and a request for formal hearing was made by Employer. On January 10, 2000, I issued a Decision and Order Awarding Benefits. The existence of pneumoconiosis and total disability were not contested, and the parties had stipulated to at least fourteen years of coal mine employment. I found that claimant had established total disability and that both the miner's total disability and death were due to pneumoconiosis, pursuant to the medical opinion evidence.

The employer appealed the award of benefits, and the Board issued its decision on March 30, 2001, affirming in part, reversing in part, and vacating in part the award. The Board held, as a matter of law, the evidence of record was insufficient to establish that the miner's total disability was due to pneumoconiosis. Thus, the award in the miner's case was reversed. The Board vacated the award of benefits in the widow's claim and remanded the case for consideration of the death certificate and Dr. Johnson's opinion regarding the cause of death. The Board instructed me to precisely characterize Dr. Harlan's opinion and fully explain my interpretation of his opinion, in addition to determining whether it was well reasoned and documented.

Claimant filed a motion for reconsideration before the Board on May 2, 2001, asserting that the Board erred in failing to consider her response brief and, in the alternative, requesting that Dr. Harlan's deposition be taken. On October 22, 2001, the Board granted the motion but denied the requested relief, finding no basis to alter its prior holdings. The Board made clear that it was within the administrative law judge's discretion to allow or disallow reopening of the evidence on remand.

The joint motion of the parties to reopen the record on remand was granted on January 30, 2002. The parties were given additional time to submit evidence relating to the widow's claim. Thereafter on March 20, 2002, Employer submitted Employer's Exhibits 3-7, which are identified and marked as follows:

Employer's Exhibit 3 – Treatment records from Vanderbilt University Medical Center
Employer's Exhibit 4 – Medical report of Dr. Will Mangano, dated October 29, 1997;
Employer's Exhibit 5 – Medical report of Dr. Peter Tuteur, dated December 31, 2001, and curriculum vitae of Dr. Tuteur
Employer's Exhibit 6 –medical report of Dr. Richard Naeye dated March 16, 2000 and curriculum vitae;
Employer's Exhibit 7, Medical report of Dr. Joseph Tomashefski dated March 4, 2003.

Employer's Exhibits 1-7 are admitted into the record.

Claimant requested an extension of time for the submission of the deposition of Dr. Harlan, the autopsy prosector, and that request was granted. Dr. Harlan's deposition was taken on June 30, 2003 and was received on August 1, 2003, and is identified as Claimant's Exhibit 1.

Employer submitted two additional exhibits on June 23, 2003 and July 18, 2003: Employer's EX-8 – a newspaper article relating to a pending state action to revoke the medical license of Dr. Harlan, the former medical examiner for the State of Tennessee; and Employer EX-9, a portion of the administrative record In the Matter of Charles Harlan, M.D. before the State of Tennessee Department of Health (a document entitled “Second Amended Notice of Charges and Memorandum of Assessment of Civil Penalty”) Claimant did not object.¹ These documents are received into evidence as enumerated.

On August 23, 2003, Employer objected to the Admission of Dr. Harlan's deposition for First, employer asserted that Dr. Harlan had agreed to provide Employer's counsel with the medical authority that supports his opinion that oat cell carcinoma of the lung can be caused by simple pneumoconiosis, yet failed to do so. Secondly, employer indicated that pending proceedings before the Tennessee Board of Medical Examiners involving charges of misconduct by Dr. Harlan could possibly result in the revocation of Dr. Harlan's license. Employer urged that, should Dr. Harlan's license be revoked, his opinion would be of no value.

Employer's objections to the admission of Dr. Harlan's deposition are overruled as they are based on highly prejudicial and serious unsubstantiated allegations. Dr. Harlan's failure to submit supporting medical authority for his opinion is a matter to be addressed by the administrative law judge in weighing the probative value of his opinion. Further, assuming the pending allegations of wrongdoing on the part of Dr. Harlan in the State proceeding are found to be true, that fact would go to the credibility of his testimony and not to its admissibility. Consequently, Dr. Harlan's deposition is received into evidence as Claimant's Exhibit 1 (CX 1). The record is hereby closed.

Summary of the Relevant Evidence

1. Medical Opinion Reports

The pathology evidence submitted by the employer includes the report by Dr. Will Mangano, dated October 29, 1997., after his review of slides from a fine needle aspiration of the liver. He diagnosed small cell undifferentiated carcinoma, and indicated that the type of tumor the miner had was aggressive. (EX 4).

Mr. Childers hospital records from Vanderbilt University Medical Center document a hospital stay from December 8, 1997 to December 10, 1997 and again from December 12, 1997 to December 15, 1997. (EX 3). Dr. David Morgan, an oncologist, attended the miner and diagnosed mental status changes, non-small-cell lung cancer with metastases to bone marrow, pneumonia, and borderline hypertension.

Dr. Darrell R. Johnson treated the miner for lung cancer beginning in September 1997. His reports are summarized in the January 10, 2000 Decision and Order and will not be repeated here. (DX 39, 37, 18, 15; EX 1).

¹ Claimant did submit a letter from David Warlick, Esq., the attorney who represents him in the proceedings before the State Board of Medical Examiners, responding to the allegations contained in these documents.

On August 30, 1999, Dr. James R. Castle reviewed medical records and provided a report. That report is thoroughly summarized in the January 10, 2000 Decision and Order and is incorporated herein by reference. (EX 2).

The death certificate was completed by Dr. Russell F. DeVore, III. (DX 10). He found the cause of death to be lung cancer from which the miner suffered for four months.

Dr. Charles W. Harlan performed the autopsy limited to the lungs on December 24, 1997. (DX 13). That report was thoroughly summarized and quoted in the January 10, 2000 Decision and Order and is incorporated herein by reference.

Dr. Harlan was deposed by claimant's attorney on June 30, 2003. (CX 1). He is board certified in anatomic, clinical, and forensic pathology. Dr. Harlan stated that he was referred to Claimant by the funeral home that handled the miner's funeral; he was not hired by Claimant's attorney. He was told of a history of 12 years of coal mine employment, a history of smoking (although the extent and duration were not given), and a history of right lung cancer. On autopsy, he found moderate emphysema bilaterally, moderate deposition of black anthracotic material in the lungs, and oat cell carcinoma of the right lung. In his opinion, all of these findings are consistent with coal workers' pneumoconiosis. He made the diagnosis of pneumoconiosis based on the anthracosis or black pigment present in the lymphatics and the fibroanthracotic nodules, the emphysematous changes, including the breakdown of the alveolar septa, and the oat cell carcinoma, all of which he believed were the causes of death. Dr. Harlan opined that such cancer can occur as a result of, or concomitantly with pneumoconiosis, or on its own. He conceded that cigarette smoke can also cause deposition of anthracotic material. In his opinion, all three of these conditions caused a disabling respiratory problem. He added that the anthracosis and emphysema caused destruction of the alveolar septa, leading to pulmonary congestion and edema in the sac spaces, and together caused a respiratory death. Dr. Harlan testified that the causes of death were pulmonary anthracosis, emphysema, and oat cell carcinoma of the right lung, all of which he believed were secondary to simple pneumoconiosis. He opined that the miner's anthracosis was due to a combination of smoking tobacco products and coal mine dust exposure. He reviewed Dr. Tomaszewski's opinion and disagreed with his finding that coal mine exposure of 12 years had no contributing effect in the formation of the miner's anthracosis.

On cross-examination, Dr. Harlan affirmed his opinion that pneumoconiosis contributed to the miner's lung cancer. While he alluded to pathology texts that support this theory, he was unable to provide a specific citation and did not do so after the deposition, despite his statement that he would. Rather, Dr. Harlan cited to his "expertise, knowledge, training, et cetera, over the years" as his basis for drawing this conclusion. He stated that he could not differentiate between anthracosis caused by coal mine dust as opposed to smoking, but believed that fibroanthracotic nodules normally occur only in people exposed to coal dust. He also agreed that smoking can cause moderately severe emphysema and small cell lung cancer. He believed both conditions caused the miner's anthracosis but could not give a percentage as to each cause's contribution. He further admitted that he knew nothing of the miner's smoking history. Dr. Harlan also disagreed with Dr. Tuteur's opinion.

On March 16, 2000, Dr. Richard L. Naeye provided a medical report. (EX 6). Dr. Naeye is board certified in anatomic and clinical pathology. He considered 15 years of coal mine employment, more than 25 pack-years of smoking, quitting in 1989, the hospital records, the death certificate, and the autopsy report. He wrote:

To my surprise Dr. Harlan attributed the lung cancer to Mr. Childers' occupational exposure to coal mine dust and resultant pneumoconiosis. He cites no scientific literature to support this opinion. [I] have been asked to comment on this claim. This issue has been extensively studied in several nations and neither U.S. nor European coal miners have been found to have an increased frequency of any form of lung cancer when cigarette smoking is taken into consideration. In fact, U.S. coal miners reportedly have a lower frequency of lung cancer than is present in the general population. The distribution of cancer cell types in coal workers is similar to that in the general population. There are a large number of other studies which also show no relationship between mining coal and lung cancer. Finally, the Assistant Surgeon General of the U.S. has testified before a congressional committee that "an increase of lung cancer in coal miners has not been documented.["] Cigarette smoking has long been known to be the major cause of lung cancer and Golan Childers reported he started smoking when he was 7 years of age and continued for 53 years thereafter.

(Footnotes omitted; emphasis original.)

Dr. Peter G. Tuteur, who is board certified in internal medicine and pulmonary disease, reviewed medical evidence on December 31, 2001. (EX 5). He considered Dr. Johnson's records, the Vanderbilt hospital records, 11 chest x-ray reports, reports of a September 3, 1997 CT scan and a November 20, 1997 CT scan, Dr. Mangano's report, Dr. Dao's pathology report, Dr. Wright's report of the fine needle aspiration, the autopsy report, Dr. Castle's August 30, 1999 report, and the death certificate. He assumed the existence of simple pneumoconiosis, although he felt it was not convincingly proved by the photomicrographs of the lung tissue. Assuming its existence, he opined that it was insufficient to produce clinical symptomatology, abnormalities on physical examination, pulmonary impairment, or radiographic change. Dr. Tuteur opined that the miner died because of carcinoma of the lung that had metastasized to the liver and stated that the oat cell carcinoma he had was the type most strongly associated with the chronic inhalation of tobacco smoke. Dr. Tuteur added that there "is no credible published data to place either the inhalation of coal mine dust or the development of coal workers' pneumoconiosis as a risk factor for the development of pulmonary malignancy such as experienced by Mr. Childers." He cited to a study of over 11,000 Polish coal miners published by Starzynski as establishing that coal miners with pneumoconiosis were not at increased risk for the development of cancer of the trachea bronchus and lungs. Thus, he concluded that death was not due to or hastened by coal workers' pneumoconiosis. Dr. Tuteur opined that Dr. Harlan's conclusion that pneumoconiosis caused the miner's anthracosis, emphysema, and cancer was internally flawed, inconsistent with the totality of available medical data on the miner, and unsubstantiated by the medical literature.

Dr. Joseph F. Tomashefski provided a report dated March 4, 2003. (EX 7). He reviewed all the medical evidence of record, including the reports of Drs. Naeye, Tuteur, and Mangano, the death certificate, Dr. Harlan's autopsy report, and hospital records. Dr. Tomashefski also

reviewed the slides of the miner's lung tissue. He saw dilated air spaces, negligible fibrosis and a mild degree of black pigment with interstitial and perivascular tissue. He found small coal macules sparsely present but they were less than one millimeter in size and in aggregate comprised less than 1% of the parenchyma on the slides. He also found undifferentiated small cell neoplasm. He diagnosed metastatic small cell undifferentiated lung cancer that had metastasized to the liver, pelvic soft tissue, rib, spine, adrenal glands, and lymph nodes. He attributed death to small cell lung cancer. Dr. Tomashefski also diagnosed panacinar and centriacinar emphysema and minimal simple coal workers' pneumoconiosis. He opined that pneumoconiosis neither caused nor contributed to the miner's death. He attributed the emphysema to long standing cigarette smoking and not to pneumoconiosis. Dr. Tomashefski stated that the cancer was not in any way related to the pneumoconiosis or coal mine dust exposure, citing to "Green and colleagues."

Adjudicative Criteria

Because Claimant filed her claim after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations. To establish entitlement to benefits under Part 718, claimant must establish by a preponderance of the evidence that the miner's death was due to pneumoconiosis. *See 20 C.F.R. §§ 718.205; Gee v. W.G. Moore & Sons*, 9 BLR 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-212 (1985). Evidence which is in equipoise is insufficient to sustain Claimant's burden of proof. *Director, OWCP v. Greenwich Collieries, et al.*, 114 S.Ct. 2251 (1994); *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). Failure to establish this element precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1998); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Further, because the miner last engaged in coal mine employment in the state of Tennessee, this matter arises within the jurisdiction of the Sixth Circuit Court of Appeals. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

DISCUSSION

I. Death due to Pneumoconiosis

In the the Sixth Circuit, death will be considered "due to pneumoconiosis" if the miner's death was at least hastened by pneumoconiosis. *See Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995); *Brown v. Rock Creek Mining Corp.*, 996 F.2d 812 (6th Cir. 1993).

The death certificate lists only lung cancer as the cause of death. However, a death certificate, in and of itself, is an unreliable report of the miner's condition, and there's no indication that Dr. DeVore possessed enough personal knowledge of the miner, aside from some involvement with the treatment of the miner's cancer, from which to assess the cause of death. In fact, he stated that he did not feel comfortable giving an opinion regarding the existence of pneumoconiosis. Therefore, I place very little weight on the death certificate. *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989).

Dr. Harlan was the autopsy prosector, and his opinion is based primarily on his autopsy examination. At his deposition, he was provided with a history of more than twelve years of coal mine employment and an unspecified length and rate of smoking. The record shows that Dr. Johnson was given a history of smoking one pack of cigarettes a day for 25 years before quitting in 1989, and the miner's daughter testified that her father had quit smoking about ten years before his death, which would have been 1987. (DX 15; Tr. 17). I consider Dr. Harlan's report documented and reasoned insofar as his primary task was to perform the autopsy, and his report meets the autopsy quality standard. However, because lung cancer was at least one cause of the miner's death, I find that Dr. Harlan's lack of knowledge of his smoking history detracts from the credibility of his opinion. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Dr. Harlan's opinion at his deposition was the same as that given prior: death was due to pulmonary anthracosis, emphysema, and oat cell carcinoma of the lung, all secondary to simple coal workers' pneumoconiosis. Dr. Harlan was unable to cite to any medical literature in support of his assertion that pneumoconiosis can cause cancer. Other physicians, by contrast, cited to studies that established no link between cancer and pneumoconiosis or coal dust exposure. In fact, both Dr. Castle and Dr. Naeye referred to findings that coal miners have a lower frequency of lung cancer than the general population. Because: (1) Mr. Childers's cancer was well documented as being widespread; (2) his lung cancer was no different from the type developed in non coal miners; (3) he had an extensive smoking history; and (4) his degree of pneumoconiosis was diagnosable only upon autopsy, I find the opinions of Drs. Tuteur, Castle, Naeye, and Tomashefski—that the cancer was not the result of pneumoconiosis—more plausible and persuasive than Dr. Harlan's opinion to the contrary.

Dr. Harlan also linked his findings of anthracosis and emphysema, in part, to pneumoconiosis, and opined that these too contributed to death because they caused destruction of the alveolar septa, leading to pulmonary congestion and edema in the sac spaces. However, there is no clinical evidence that the miner had a respiratory impairment. Dr. Johnson noted none and stated that the miner did not complain of any breathing problems even after a round of chemotherapy. Both x-ray and CT evidence were negative for pneumoconiosis. Consequently, I find Dr. Harlan's opinion linking the anthracosis to death to be poorly reasoned and documented. Furthermore, the other physician to view the autopsy slides, Dr. Tomashefski, found emphysema but attributed it to smoking, not pneumoconiosis. Therefore, I discount Dr. Harlan's opinion on this matter.

Dr. Tomashefski's opinion is entitled to greater weight. He is a board-certified pathologist who reviewed the histological evidence, putting him in as good a position as Dr. Harlan was to actually see what was under the microscope. He also had the advantage of reviewing the opinions of Dr. Naeye, another board-certified pathologist, and Dr. Tuteur, a pulmonary specialist, as well as Dr. Mangano's biopsy report. Based on all this evidence, Dr. Tomashefski was able to state that the cancer had spread to the liver, pelvic soft tissue, rib, spine, adrenal glands, and lymph nodes. This proof of overwhelming cancer bolsters Dr. Tomashefski's opinion that the cancer alone was the cause of death. Because Dr. Tomashefski's opinion is based on more data than Dr. Harlan's, they have equivalent credentials, and Dr. Tomashefski's opinion is supported by the reports of all the other physicians in this case, I find his opinion better reasoned, better documented, and more persuasive than Dr. Harlan's.

The opinions of Drs. Castle, Naeye, and Tuteur are based on a review of medical evidence. None of these physicians actually viewed the autopsy slides. However, I find their opinions to be well documented and reasoned. They are each board certified specialists, and their opinions are well supported by the miner's smoking history, presenting symptoms and complaints, the pathology reports both before and after the miner's death, and the aggressive nature of Mr. Childers's cancer. Accordingly, I place great weight on their findings.

Dr. Johnson was the miner's treating oncologist beginning three months before his death, although he did not treat him in the last month of his life. As such, he had some knowledge of Mr. Childers's condition. Dr. Johnson acknowledged that he never assessed the miner for pneumoconiosis; his job was to treat Mr. Childers's cancer. Dr. Johnson confirmed that the miner had incurable, "widespread metastatic lung cancer." He felt unqualified to state that lung cancer was the only cause of death, adding "any relation to any pre-existing pneumoconiosis is uncertain." Dr. Johnson deposed that he attributed all of the miner's symptoms (which did not include respiratory trouble) to his cancer and its treatment since he first saw him after he'd already undergone one round of chemotherapy. I consider Dr. Johnson's opinion regarding the role cancer played in the miner's death to be well documented and reasoned. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). He is a board-certified oncologist and personally treated the miner. *Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). However, inasmuch as Dr. Johnson was wary of making any opinion as to the role pneumoconiosis played in the miner's death, I place little weight on his opinion. I do find, though, that his opinion supports those of Drs. Castle, Naeye, Tuteur, and Tomashefski.

Similarly, I find that Dr. Mangano's report, finding an aggressive cancer in the liver, and the Vanderbilt University hospital records showing lung cancer that had spread to the bone marrow supportive of the findings of Drs. Castle, Naeye, Tuteur, and Tomashefski.

For the reasons set forth above, I find that Claimant has failed to establish, by a preponderance of the evidence, that the miner's death was due to pneumoconiosis. She is therefore not entitled to benefits.

Entitlement

Since Claimant has not established that the miner's death was due to coal workers' pneumoconiosis under the provisions of Section 718.205, she is not entitled to benefits under the Act. Accordingly, this claim must be denied.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for representation services rendered on her behalf in pursuit of this claim.

ORDER

The claim of Marguerite Childers for benefits under the Act is hereby DENIED.

A

MOLLIE W. NEAL
Administrative Law Judge